EDITOR'S NOTE

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SUPREME COURT, U.S.

NO. 85-151

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

Supreme Court, U.S.
FILED
SEP 25 1985
JOSEPH F. SPANIOL, JR.
CLERK

LANE McCOTTER, Director,
Texas Department of Corrections,

Petitioner,

- against -

PEDRO CRUZ MUNIZ,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

JESSE ROY BOTELLO
515 South Main Avenue
San Antonio, Texas 78204
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ATTORNEY FOR RESPONDENT

NO. 85-151

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515 South Main Avenue
San Antonio, Texas 78204
[512] 225-5346

ATTORNEY FOR RESPONDENT

QUESTIONS PRESENTED

1. Whether the Williamson County District Attorney's claim that a 1981 decision of this Court should now be declared non-retroactive presents any colorable issue warranting the grant of certiorari.

2. Whether this Court should hear a harmless error claim which (i) was conceded in respondent's favor by the prosecution before the Fifth Circuit and accordingly was not addressed in that Court's opinion, and (ii) has been rejected by both the Texas Court of Criminal Appeals and the Fifth Circuit in every case in which it has been addressed.

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A.

The Court of Appeals below made the following findings, which the district attorney has not challenged in his certiorari petition:

> The psychiatrist [Dr. John Holbrook] who interviewed Muniz did so at the direction of the prosecutor and without notice to the attorney for Muniz. No Miranda warning was given Muniz, nor was he told that the responses to the doctor's questions might be used against him on issues governing his punishment. The psychiatrist then used that interview as the basis for his opinion, to which he testified at the punishment phase of the trial, that Muniz would probably commit criminal acts of violence that would constitute a continuing threat to society. There is no question but

> that, under Estelle v. Smith, [451 U.S. 454 (1981),] there were Fifth and Sixth Amendment violations.

Certiorari Petition at A-2; 760 F.2d 588, 589 (5th Cir. 1985).

Dr. Holbrook was the prosecutor's only expert witness at the penalty phase. The district attorney also introduced evidence of Mr. Muniz's prior criminal record, which consisted solely of two misdemeanor offenses (SF 5132, 5134).[1/] The defense called four relatives and friends: Richard Deloy, Fernando Mechano, Maria Muniz and Christina Muniz (SF Vol. 24). They testified that respondent was a good husband and father who was affectionate towards his wife and three children, treated his family well, and kept his family well clothed and fed by working as a cabinet maker (SF 5194, 5195, 5210, 5215-16).

The jury at the penalty phase ultimately returned to the courtroom without having answered Texas Special Sentencing Issue No. 2, which requires a finding as to whether "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code Crim. Proc. Art. 37.071(b)(2). The trial judge, over defense counsel's objection, then instructed the jurors to continue their deliberations and "see if you can arrive at an answer to Special Issue No. 2" (SF 5255, 5263). Subsequently, the jury requested additional instruction as to the appropriate definition of the word "probability" as used in the special issue (SF 5266). Finally, after nearly six hours of deliberation, the jury returned with an affirmative answer to Special Issue No. 2 and respondent was sentenced to death (SF 5268).

1/ Numbers preceded by "SF" refer to pages of the Statement of Facts (transcript) before the Texas Court of Criminal Appeals.

B.

On federal habeas corpus the State was represented in the district court and the Fifth Circuit by the Texas Attorney General. The State initially argued that Mr. Muniz had waived error under Estelle v. Smith, 451 U.S. 454 (1981), by failing to interpose an adequate objection at trial. However, while the appeal was pending, the Texas Court of Criminal Appeals decided Ex Parte Chambers, 688 S.W.2d 483 (Tex. Cr. App. 1984), in which it adhered to several prior decisions holding as a matter of Texas state law that failure to object at trials conducted prior to Smith does not constitute procedural default.[2/] The State then filed a Supplemental Brief in which it raised for the first time the claim that this Court's 1981 Smith holding should be declared non-retroactive. In that Supplemental Brief the State also conceded that the Smith error in this case was not harmless, stating:

> Respondent cannot, in good faith, assert that there is no reasonable possibility that Dr. Holbrook's testimony contributed to the jury's answering of the second special issue in the affirmative.

Supplemental Brief of Respondent-Appellee in Muniz v. Procunier, No. 84-1791 (5th Cir.), p. 28 (annexed hereto as Appendix A). In light of this concession, the Fifth Circuit did not address the subject of harmless error in its opinion.

On May 9, 1985, the Texas Attorney General advised the local prosecutor that his office would not seek certiorari in this case. However, on June 21, 1985 the Attorney General agreed to allow the local prosecutor to be substituted as counsel for the State in order to seek certiorari. See Motion for Substitution As Counsel of Record in the court below (annexed hereto as Appendix B).

2/ See 688 S.W.2d at 484; id. at 485-86 (concurring opinion joined by a majority of the Court). See also Green v. Estelle, 712 F.2d 995 (5th Cir. 1983), discussing several earlier Texas cases on this point.

REASONS FOR DENYING THE WRIT

I. RETROACTIVITY

The district attorney's retroactivity argument presents no colorable issue warranting certiorari, for at least three separate reasons.

A. The decision of the Fifth Circuit is fully consistent with earlier decisions of that court holding Estelle v. Smith, 451 U.S. 454 (1981), retroactive. It is also consistent with the position of the Texas Court of Criminal Appeals, which "has given retroactive application to ... Smith." Ex parte Chambers, supra, 688 S.W.2d at 484. The leading Fifth Circuit opinion, Battie v. Estelle, 655 F.2d 692, 696-99 (5th Cir. 1981), remains as unimpeachable today under Solem v. Stumes, ___ U.S. ___, 79 L.Ed. 2d 579 (1984), as under prior decisions of this Court.

Although the Texas courts had repeatedly ignored the Miranda implications of prosecutors' tactics involving Doctors Grigson and Holbrook prior to 1981, the unconstitutionality of these tactics was never seriously in doubt by the federal judiciary. Smith, the first Texas capital case presenting the issue to reach a federal court, sailed through the federal system without a single judge or Justice voting for the State's position. Habeas corpus relief was granted by the district court, 445 F.Supp. 647 (N.D. Tex. 1977); a unanimous panel of the Fifth Circuit affirmed, 602 F.2d 694 (5th Cir. 1979); rehearing en banc was denied without any request for a poll, let alone any dissent, 606 F.2d 321 (5th Cir. 1979); and this Court unanimously affirmed, 451 U.S. 454 (1981).

B. To be sure, only six Justices were willing to decide Smith on Fifth Amendment grounds; Justices Stewart, Powell and Rehnquist did not wish to reach that question. But the Court was unanimous on the Sixth Amendment basis for its decision, with all three opinions stating that the result was a simple and obvious applica-

tion of Massiah v. United States, 377 U.S. 201 (1964). See Estelle v. Smith, supra, 451 U.S. at 469-71; id. at 474 (concurring opinion of Justice Stewart, joined by Justice Powell); id. at 474-75 (concurring opinion of Justice Rehnquist). For such a decision to be declared non-retroactive is inconceivable.

Any contention that Smith was not "'clearly' or 'distinctly' foreshadowed" by prior law within the meaning of Solem v. Stumes, supra, 79 L.Ed. 2d at 591, misconceives both decisions. In Stumes the holding of Edwards v. Arizona, 451 U.S. 477 (1981), was held to have "establish[ed] a new rule" (79 L.Ed. 2d at 589), not clearly foreseeable, because it innovated "a per se approach" (ibid.) after this Court "had several times refused to adopt per se rules governing the waiver of Miranda rights" (id. at 590). The Court's Sixth Amendment decision in Smith involved no similar innovation departing from a course of previous precedent. It simply applied Massiah, according to Massiah's plain language and unmistakable purport, in a factual setting where the application of the Massiah rule was clear. After Hoffa v. United States, 385 U.S. 293 (1966), and Kirby v. Illinois, 406 U.S. 682 (1972), it was hornbook law that the fact of indictment alone triggered a criminal defendant's Sixth Amendment right to counsel in any confrontation with state-instigated agents. Massiah himself had been confronted not with a police interrogator but with an undercover agent; Massiah was not in custody at the time of the confrontation, but at large on bail. The application of Massiah to an indicted defendant questioned in custody by a psychiatrist acting as an agent of the prosecutor is simply a fortiori. To claim that it was not clearly and distinctly foreshadowed by Massiah is disingenuous.[3/]

3/ The fact that the Texas Court of Criminal Appeals blindly refused to obey this basic principle of constitutional law for many years with respect to the activities of Doctors John Holbrook and James P. Grigson, e.g., Gholson v. State, 542 S.W.2d 395, 400 (Tex. Cr. App. 1976), hardly triggers retroactivity analysis.

As the Court of Appeals below observed:

> While Estelle v. Smith may have been a new and clear break with the past in the view of Texas courts, we do not think the Supreme Court so regarded it. The Court saw the psychiatric testimony on future dangerousness, without prior warning or advice of counsel, as violating clearly established constitutional law. It was a unanimous judgment, three [opinions] of the Justices saying that the 1964 case of Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), decided the matter. [Smith did not] ... establish[ ] a new principle of constitutional law.

Certiorari Petition at A. 4-5; 760 F.2d 590 (5th Cir. 1985).

C. Finally, it is important to note that rejection of the prosecutor's retroactivity argument will have no significant "disruptive effect on the administration of Justice" in Texas, Solem v. Stumes, supra, 79 L.Ed.2d at 591. In the more than four years since Smith was decided and held retroactive in Battie, virtually every Texas death row inmate with a Smith claim has already been granted relief.[4/] According to the records of the NAACP Legal Defense Fund, at least nineteen have had their death sentences vacated by state or federal courts on the basis of Smith, and at least seven more have had their sentences commuted by the Governor at the prosecution's request in advance of court decisions. (See Appendix C, infra.)[5/] We are aware of only one Smith case decided by the Fifth Circuit pursuant to this case, Jones v. Procunier, 767 F.2d 101 (5th Cir. 1985), and two more pending in

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4/ The Texas Attorney General did not seek certiorari in Battie.

5/ The Governor of Texas commuted over 30 death sentences in the wake of Smith and Adams v. Texas, 448 U.S. 38 (1980). It is quite possible that many more than seven involved Smith issues. The Legal Defense Fund's list is conservatively limited to cases in which opinions or court papers on file at the Fund conclusively establish the presence of a Smith claim.

There may be other Texas death cases in which psychiatrists testified for the prosecution at the penalty phase hypothetically (i.e., without examining the defendant), or at the guilt trial in response to an insanity defense, or at a competency trial in response to a claim of incompetence, or for some other purpose. These cases, of course, are not covered by Smith, and are unaffected by the claim advanced in the certiorari petition. See Barefoot v. Estelle, 463 U.S. ___, 77 L.Ed.2d 1090 (1983); Estelle v. Smith, supra, 451 U.S. at 465-66 & n.10.

the federal district court for the Eastern District of Texas, plus Ex Parte Chambers, supra. To the best of counsel's knowledge, just about every death sentence that could be vacated under Smith has been vacated already.[6/] And if the State has any information to the contrary, it certainly has not said so: in neither this case nor Chambers have the prosecutors identified from their records a single pending case which would be affected by declaring Smith non-retroactive at this late date.[7/] The impact of denying certiorari is virtually nil.

II. HARMLESS ERROR

A. This Court has a long-standing policy of declining to hear issues which were "not raised in the Court of Appeals and ... not addressed by that court." Rogers v. Lodge, 458 U.S. 613, 628 n. 10 (1982); Adickes v. S.H. Kress & Co., 398 U.S. 144, 147 n.2 (1970). See Stern & Gressman, Supreme Court Practice 457 (5th Ed. 1978) and cases cited therein.

In this case the harmless error claim was not merely "not raised" in the Fifth Circuit. It was expressly conceded in Mr. Muniz's favor by the Attorney General of the State of Texas. See

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6/ It is highly unlikely that there might be a few still pending in the Texas Court of Criminal Appeals. Texas prosecutors were on notice as to the nature of Smith error, and were therefore able to avoid committing it, at least after the Fifth Circuit's Smith decision in 1979 (if not after the District Court's decision in 1977). For a capital appeal to be pending in the Texas Court of Criminal Appeals six years after trial is exceedingly rare. Thus, it is hard to imagine that any capital case still pending in the Texas courts is old enough to contain Smith error.

7/ The Texas Attorney General's Office, which has a better statewide overview of capital cases pending on collateral review than any individual district attorney, has declined to seek certiorari on this issue. See p. 3, supra and Appendix B.

p. 3, supra and Appendix A. And in light of the Attorney General's concession, the issue was not addressed in the opinion below. Leaving aside the question of whether the local district attorney is now bound by the Attorney General's concession (much as new counsel for a habeas petitioner is normally bound by the waivers, concessions and procedural defaults of prior counsel), it is hard to imagine an issue more procedurally unsuitable for review by this Court.

B. Substantively also, the issue is unworthy of certiorari. The harmless-error question raised by the petition is completely fact-bound. Petitioner asks this Court to review the entire trial record, assess the weight and quality of the evidence on both sides, and decide whether Dr. Holbrook's testimony was, in this context, more or less likely to have affected the outcome. No principle of general applicability can emerge from this inquiry, and petitioner does not suggest any way in which the Court's undertaking of the inquiry would clarify or develop the constitutional law of harmless error or any other legal doctrine. If there was ever an issue of importance to no one but the parties in a particular case, this is it.

To consider such an issue is not, of course, the office of the certiorari jurisdiction. All that petitioner wants this Court to do is to pore over the transcript of an individual case in order to make a routine application of settled harmless-error analysis. The Court has ample opportunity to illustrate such applications every Term, when it decides cases raising important substantive questions which warrant its attention.

C. The decision below conforms in approach and result to every other reported decision considering whether Smith errors have been harmless on the facts of particular cases. In White v. Estelle, 720 F.2d 415 (5th Cir. 1983), the Fifth Circuit expressly rejected the

prosecution's claim that a Smith error was harmless. The Court held:

> We cannot conclude that evidence admitted on a critical issue in the sentencing phase of a capital case, in violation of White's constitutional rights, constituted harmless error beyond a reasonable doubt.

720 F.2d at 418. Similarly, in Green v. Estelle, 706 F.2d 148 (5th Cir. 1983), rehearing denied with opinion, 712 F.2d 995 (5th Cir. 1983), the Court of Appeals granted Smith relief despite a strenuous harmless error argument by the Texas Attorney General.[8/] See also Battie v. Estelle, supra (State called eleven witnesses to testify concerning defendant's bad reputation and two more who recounted specific acts of violence made by him,[9/] yet introduction of psychologist's testimony in violation of Smith was not deemed harmless).

The Texas decisions are in the same vein. See Clark v. State, 627 S.W.2d 693, 697-98 (Tex. Cr. App. 1981). As the court observed in Clark:

> the issue we must confront is not whether the facts of the crime, standing alone, would support the finding [of probable future dangerousness], but whether the testimony of Coons [the prosecution's psychiatrist] might have contributed to the jury's verdict during the punishment phase. We conclude that there was a reasonable possibility that Coons' testimony might have contributed to the jury's verdict during the punishment phase of appellant's trial.

627 S.W.2d at 698. Indeed, under Texas law, the erroneous admission of far less damaging and central evidence at the penalty phase of a capital trial has been held prejudicial and reversible. See Cortez v. State, 571 S.W.2d 308 (Tex. Cr. App. 1978) (intro-

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8/ See Brief for Respondent in Green, No. 82-2324 (5th Cir.) at 30-34.

9/ Brief for Respondent in Battie, No. 79-1567 (5th Cir.), at 4; Second Supplemental Brief for Respondent in Battie at 2 (filed after Smith was decided).

duction of improperly authenticated 1954 and 1960 convictions for auto larceny was not harmless, even though the prosecution had established more recent convictions for more serious crimes and had also presented psychiatric testimony as to the defendant's probable future dangerousness).

The reasoning underlying the above-cited decisions is obvious and compelling. The expert testimony deemed inadmissable in Smith is not merely one more item of evidence to be weighed against other, properly admitted evidence, in reaching a harmless error determination. Such expert testimony speaks directly, and with the appearance of weighty scientific authority, to the very question of probable future dangerousness posed by Tex. Code Crim. Proc. Art. 37.071(b)(2). It does not simply provide the jury with evidence to apply in searching for an answer to the statutory sentencing question; instead it purports to answer the question itself, and as a matter of science no less. That is why Smith errors could not be deemed harmless beyond a reasonable doubt (Chapman v. California, 386 U.S. 18 (1967)) by the Fifth Circuit in White, Green and Battie, or by the Texas Court of Criminal Appeals in Clark.

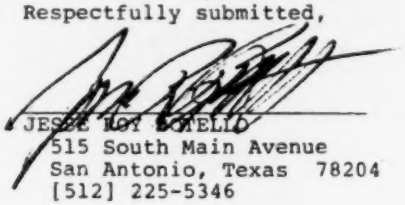
Assuming that there could be cases in which the other evidence of probable future dangerousness is so overwhelming as to render Smith error harmless, this is not such a case. As noted at p. 2, supra, respondent's entire prior criminal record consisted of only two misdemeanor convictions. He had strong family ties and a good work record. And the sentencing jury obviously had considerable difficulty reaching a verdict on the question of probable future dangerousness: it deadlocked at first and had to be admonished to resume deliberations and try again; even after resuming deliberations it requested further instruction on the meaning of the word

"probability" in Special Issue No. 2; and it did not arrive at a verdict until nearly six hours of deliberation had passed. Under these circumstances, the Texas Attorney General was quite correct in conceding below that the unconstitutional admission of Dr. Holbrook's testimony could not be deemed harmless error.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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ATTORNEY FOR RESPONDENT

APPENDIX A

SUPPLEMENTAL BRIEF OF RESPONDENT-APPELLEE

IN MUNIZ v. PROCUNIER, No. 84-1791 (5th Cir.), p. 28

Estelle. [9] This court rejected the "death is different" theme when it stated:

> In general response to the implicit suggestion, we note our disagreement with it. The various expressions of the Supreme Court quoted by Bass are not more than precatory ones, expressive of the sanctity with which all decent men view human life as endowed and the gravity with which they regard a decision--however measured it may be--to terminate it. Nor are these expressions novel or the sentiments which they avow newly-arisen; they go back to the Black Cap and beyond, stretching far into times when human life was shorter, more perilous, and less highly regarded than it is today. To be sure, they also refer to the many explicit safeguards that have now been enacted or decided to express these concerns. But to suggest that a different general mode of review is required by them is to demean the criminal law generally, to imply that we might somehow view lightly such questions as whether a life sentence or one for a lengthy term of years was arrived at properly. There is one system of criminal appellate review, applicable to all cases and to this one.

Id., at 1157 n.2.

Respondent would concede that the district court was incorrect in its conclusion that the admission of Dr. Holbrook's testimony constituted harmless error. See Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967). Respondent cannot, in good faith, assert that there is no reasonable possibility that Dr. Holbrook's testimony contributed the the jury's answering of the second special issue in the affirmative. See White v. Estelle, 720 F.2d 415, 419 (5th Cir. 1983).

9/ See Brief for Petitioner Bass at pages 7-8, 16, 25-32, Bass v. Estelle, No. 82-2341.

APPENDIX B

MOTION FOR SUBSTITUTION AS COUNSEL OF RECORD

NO. 84-1791

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

PEDRO CRUZ MUNIZ,

Petitioner-Appellant,

V.

LANE MCCOTTER, DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

On Appeal From the United States District Court
For the Western District of Texas
Austin Division

MOTION FOR SUBSTITUTION AS COUNSEL OF RECORD

KEN ANDERSON
DISTRICT ATTORNEY

MICHAEL PATRICK DAVIS
ASSISTANT DISTRICT ATTORNEY
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ATTORNEYS FOR RESPONDENT-APPELLEE

NO. 84-1791

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

PEDRO CRUZ MUNIZ,

Petitioner-Appellant,

V.

LANE MCCOTTER, DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

On Appeal From the United States District Court
For the Western District of Texas
Austin Division

MOTION FOR SUBSTITUTION AS COUNSEL OF RECORD

TO THE HONORABLE JUDGES OF THE COURT OF APPEALS:

NOW COMES Lane McCotter, Director, Texas Department of Corrections, Respondent herein, and moves the court to enter an order appointing the District Attorney of Williamson County as Respondent's attorney of record in place of the Attorney General of Texas in the above-entitled cause and in support of such motion shows:

I.

On May 9, 1985, this court reversed the judgment of the district court denying a writ of habeas corpus and remanded the case to the district court with instructions to grant the writ. Mandate was issued by this court on the date of decision.

II.

On May 9, 1985, the Attorney General of the State of Texas informed the District Attorney of Williamson County that the attorney general's office would not file a petition for writ of certiorari in the United States Supreme Court. On June 21, 1985, the attorney general's office agreed to allow the District Attorney of Williamson County to be substituted as counsel of record to enable the district attorney to file a petition for writ of certiorari: (see letter attached as Exhibit A). The Attorney General of the State of Texas has also agreed to file a motion for withdraw as counsel of record.

III.

On July 25, 1985, a petition for writ of certiorari seeking review of this court's decision in No. 84-1791 was docketed in the United States Supreme Court as No. 85-151, entitled Lane McCotter, Director, Texas Department of Corrections v. Pedro Cruz Muniz.

WHEREFORE, PREMISES CONSIDERED, it is repsectfully requested that Respondent's Motion for Substitution as Counsel of Record be granted.

Respectfully submitted,

KEN ANDERSON
DISTRICT ATTORNEY

MICHAEL PATRICK DAVIS
ASSISTANT DISTRICT ATTORNEY
Williamson County Courthouse
Georgetown, Texas 78626
(512) 869-4332

EXHIBIT "A"

THE ATTORNEY GENERAL
OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

June 21, 1985

Mr. Ed Walsh
District Attorney
Williamson County Courthouse
Georgetown, Texas 78626

Re: Pedro Cruz Muniz v. Procunier, ___ F.2d ___
No. 84-1791 (May 9, 1985)

Dear Mr. Walsh:

By this letter, this office authorizes you to appear as counsel of record on behalf of Mr. Lane McCotter, who has succeeded Raymond Procunier as Director of the Texas Department of Corrections, to enable you to file a petition for writ of certiorari seeking review of the above-referenced decision.

If this office may be of any further assistance to you in this matter, please do not hesitate to call me.

Very truly yours,

F. Scott McConn

F. SCOTT McCONN
Assistant Attorney General
Chief, Enforcement Division
P. O. Box 12548, Capitol Station
Austin, Texas
(512) 457-3281

FSMc./rm

CERTIFICATE OF SERVICE

I, Michael Patrick Davis, Assistant District Attorney of Williamson County, do hereby certify that one true and correct typewritten copy of the above and foregoing Respondent's Motion for Appointment as Attorney of Record has been served by placing the same in the United States mail, certified, return receipt requested, on this the 13 day of August, 1985, addressed as follows: Mr. Jessie Roy Botello, 515 South Main Avenue, San Antonio, Texas 78204.

MICHAEL PATRICK DAVIS
ASSISTANT DISTRICT ATTORNEY

APPENDIX C

Texas Capital Cases Known to the NAACP Legal Defense and Educational Fund, Inc. Involving Estelle v. Smith Issues

APPENDIX C

Texas Capital Cases Known to the NAACP Legal Defense and Educationa Fund, Inc. Involving Estelle v. Smith Issues

I. Fifth Circuit Cases

1. White v. Estelle, 720 F.2d 415 (5th Cir. 1983)
2. Green v. Estelle, 706 F.2d 148 (5th Cir. 1983)
3. Gholson v. Estelle, 675 F.2d 735 (5th Cir. 1982)
4. Ross v. Estelle, 675 F.2d 734 (5th Cir. 1982)
5. Battie v. Estelle, 655 F.2d 692 (5th Cir. 1981)

II. District Court Cases

1. Bell v. Estelle, C.A. No. B-81-909 (E.D. Tex. Jan. 17, 1984)
2. Shippy v. Estelle, C.A. No. W-81-CA-081 (W.D. Tex. Oct. 24, 1983)
3. Von Byrd v. Estelle, No. B-79-760-CA (E.D. Tex. June 9, 1983)
4. Livingston v. Estelle, No. S-77-75-CA (E.D. Tex. Jan. 6, 1983)
5. Collins v. Estelle, C.A. No. W-78-CA-91 (W.D. Tex. Sept. 13, 1982)
6. Denney v. Estelle, C.A. No. B-80-161 (S.D. Tex. Feb. 4, 1982)
7. Ferguson v. Estelle, No. W-80-CA-50 (W.D. Tex. Jan. 12, 1982)

III. Texas Court of Criminal Appeals Cases

1. Mays v. State, 653 S.W.2d 30 (1983)
2. Ex Parte English, 642 S.W.2d 487 (1982)

3. Ex Parte Demouchette, 633 S.W.2d 879 (1982)

4. Fields v. State, 627 S.W.2d 714 (1982)

5. Clark v. State, 627 S.W.2d 693 (1981)

6. Brandon v. State, No. 59,348 (June 2, 1982)

7. Thompson State, 621 S.W.2d 624 (1981)

Commutations by the Governor prior to court decision in cases known to contain Smith issues

1. Jackie Osteen (June 17, 1981)

2. James Simmons (Aug. 17, 1981)

3. Magdaleno Rodriguez (Oct. 16, 1981)

4. William Hammett (Oct. 21, 1981)

5. Artie Armour (Oct. 21, 1981)

6. Doyle Boulware (Oct. 20, 1982)

7. Moses Garcia (March 22, 1983)